

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

ACCESSIBLE SPACE, INC.

Employer

and

JEFFREY NELSON

Petitioner

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

Union

Case 18-RD-2534

DECISION AND ORDER

Petitioner seeks an election to determine whether certain employees of the Employer wish to continue to be represented by the Union. The Union contends that this petition should be dismissed because the Employer is a health care institution under Section 2(14) of the National Labor Relations Act and therefore the petition is not timely filed.¹ Petitioner and the Employer claim that the Employer is not a health care institution and that the petition is timely filed. However, all parties agree that the only issue to be decided is whether the Employer is a health care institution. Thus, no party contends that if the Employer is a health care institution, the petition is timely.

¹ The petition was filed on April 27, 2005. The parties stipulated that the collective-bargaining agreement expires on June 30, 2005.

I conclude that the Employer is a health care institution within the meaning of Section 2(14) of the Act, and therefore the petition is not timely filed. Therefore, the petition is dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. In the first section of this Decision, I will review the Employer's operation. In the second section, I will describe the Employer's bargaining unit employees. Finally, I will analyze the applicable case law and explain my conclusion that the Employer is a health care institution.

² The Employer, Accessible Space, Inc., is a Minnesota corporation operating facilities in Duluth, Minnesota, where it provides housing and care to disabled individuals. The Employer's gross revenues annually exceed \$500,000, and it annually purchases goods or services in excess of \$50,000 directly from points located outside the State of Minnesota.

THE EMPLOYER'S OPERATION

The Employer owns and operates 82 apartment buildings in 28 states including Minnesota. The Employer provides apartments reserved for low income, mobility impaired individuals. The Employer's stated mission is to provide affordable, accessible housing in a community setting and to provide assistance which allows people with physical disabilities or mobility impairments to be as independent and self-reliant as possible. The Employer employs a total of 625 employees.

The buildings operated by the Employer meet the requirements of the U.S. Department of Housing and Urban Development (HUD), and all building residents must qualify under HUD guidelines as low income housing eligible. In addition, for the buildings located in Duluth, residents must have a qualifying mobility impairment or disability. Residents have a wide range of mobility impairments including paralysis, paraplegia, quadriplegia, general weakness as a result of multiple sclerosis or post-polio as well as other disabilities.

The facilities at issue here are located in Duluth, Minnesota. They are named Red Ruth, Pine Grove and Superior View. Approximately 50 employees work in these apartment buildings. These 50 employees include resident assistants (also commonly referred to as personal care assistants, and the two terms will be used interchangeably in this Decision), maintenance mechanics, building caretakers and supervisors. Only the resident assistants are in the unit in question. The personal care assistants assist the residents with various aspects of daily living, as will be described below. In general, this assistance is referred to as "personal cares." There are 28 and 23 personal care assistants at Superior View and Pine Grove, respectively.

Superior View and Pine Grove each have 24 apartment units. Red Ruth has 18 units. Superior View houses about 30 residents, and Pine Grove houses about 32 residents. Some, but not all, of the residents of the Pine Grove and Superior View buildings receive personal care services from the bargaining unit employees. None of the Red Ruth residents receives personal care services from bargaining unit employees. For those residents who do not utilize personal care services provided by the Employer's bargaining unit employees, they contract with other providers for the same type of services.

Not all of the resident assistants who provide personal care services at the Employer's Duluth facilities are in the bargaining unit because some work too few hours to meet the minimum hours set forth in the contract. There are about 35 resident or personal care assistants who are currently in the unit.

For the Pine Grove and Superior View buildings there is one Site Supervisor that supervises the bargaining unit employees. In addition, the Employer employs a Personal Care Assistant Supervisor (PCA Supervisor) who is a registered nurse and who supervises the resident assistants at both buildings.

In addition to the rent charged for the apartment, the Employer charges fees for any services provided by the resident assistants. The fees are billed to Medicaid, private insurance or directly to the resident. Fees are based on the amount of time spent by the resident assistant in performing the service. Time is assessed in 15-minute increments, referred to as units. There is no fee differentiation based on the type of service provided. The services are recorded on a time sheet which lists each

resident's name and available services. Services provided are indicated by checkmarks on the sheet.

Resident assistants are not typically assigned to any one patient. The employees work three shifts with the number of employees varying depending on the time of day. The units allotted for the personal cares of the residents are pooled together. Therefore, if one resident requires more care on a given day than the units allowed, the units may be taken from another resident whose needs may be less that day.

In order to be eligible to live in one of the Employer's apartment buildings, the residents must be able to direct their own cares, meaning they must be able to tell the care assistants what they want, when and how. While the resident assistants may suggest a care to be provided, the resident is the final word on whether the care is given. The Employer will not provide personal care services if the care required is too complex, although those individuals can still live in the apartment units. In addition, some residents receive personal care services from the Employer and health care services from an outside resource. The Employer does not have access to medical records of any residents.

THE RESIDENT ASSISTANTS

Under Medicaid, personal care services are reimbursable. Although Medicaid is a federal program, it is administered by the state. Each state must either opt in or opt out of the personal care provision for Medicaid. In Minnesota, an opt-in state, Medicaid pays for personal care services. The Medicaid program is then implemented through the counties. In Minnesota, a public health nurse employed by the county assesses the

nature and frequency of the personal care services that each resident requires in order to live safely and independently in the community. The nurse then develops a plan of care and submits that plan to Medicaid. The plan indicates the approximate number of hours of personal care assistance that each resident needs per day. The Minnesota Department of Human Services allows the Employer to bill for personal care services, homemaker services, extended personal care, companion services, chore services, independent living skills, and behavioral program services.

The resident assistants are then responsible for implementing the plan and providing the services specified in the plan. However, the resident assistants may suggest that a resident be reassessed if, in implementing the plan, it turns out that it takes longer to provide the services than indicated in the plan. That suggestion would be communicated to the Site Supervisor or the PCA Supervisor, who would then assess the situation and ultimately communicate it to the public health nurse if warranted.

Medicaid also requires that a registered nurse, social worker or mental health professional, any of whom must have a four-year degree, oversee the personal care assistants. The Employer's Personal Care Assistant Supervisor is a registered nurse. She is responsible for ensuring compliance with the service plan developed by the county health nurse. Specifically, she reviews the charting records created by the personal care assistants which document the performance of services in order to ensure that services were provided adequately and promptly. She also ensures that the charts are completed. Additionally, the PCA Supervisor, in conjunction with the Site Supervisor, provides much of the hands-on disability training, including teaching the staff to solicit the service needs of the residents.

Resident assistants must be at least 18 years of age with the ability to lift between 100 and 200 pounds, be proficient in spoken and written English and have the ability to problem solve and work independently. The resident assistants receive on-site training from the Employer in order to familiarize them with physical disabilities of the residents and the kind of care required for each. For example, the resident assistants may be trained in issues relating to multiple sclerosis, spinal cord injury, stroke and a variety of other disabilities, depending on the disabilities of the Employer's current residents. The Employer also provides OSHA training to educate employees on how to protect themselves from coming in contact with bodily fluids. They receive injury prevention training focused on lifting and body mechanics, and although not required by state or federal regulation, the Employer requires all of its staff members to be trained in both CPR and First Aid. The training is conducted by the Site Supervisor and the PCA Supervisor.

The primary function of resident assistants is to assist the apartment residents in the "activities of daily living" described in the federal Medicaid regulations as the normal occurrences in daily living that, absent a disability, they would do for themselves. Some specific examples of personal care services that resident assistants would provide include dressing, mobility assistance, toileting, grooming, bathing, meal preparation and eating assistance, cleaning, laundry, shopping, bill paying and other household chores. As stated in the Employer's post-hearing brief, the resident assistants are the "arms and legs" of the tenants. In addition, resident assistants must chart the care provided, and the length of time necessary to provide each care. Resident assistants may not administer medication. If an emergency medical situation arises, the resident assistants

call 911 and notify their supervisor. They may administer CPR and would respond to any direction given by medical personnel.

There is record evidence that personal care assistants occasionally change bandages, as well as gauze around catheters; care for wounds; apply skin care products (including those requiring a prescription); assist with range of motion exercises; and assist residents who are unable to take oral medications by themselves. The record does not establish how much time these activities take, but they appear to not be a significant part of resident assistants' overall duties.

APPLICABLE CASE LAW AND CONCLUSIONS

The evidence is clear that the only job of resident assistants is to provide personal care services as described above. While much of the record is devoted to evidence and argument regarding whether resident assistants provide health care assistance, I conclude that they are primarily involved in assisting with daily personal living and care needs of the residents. While it appears that resident assistants may perform some health care related services, they appear to require a minimum amount of time when looking at the overall services the resident assistants provide. Therefore, for purposes of this Decision, I conclude that resident assistants primarily assist in the personal daily cares of physically disabled residents. More specifically, the kinds of services provided include bathing, toileting, mobility assistance, grooming, cooking, eating assistance, cleaning, and the like. Thus, the services provided by resident assistants are similar to the duties performed by nursing assistants in nursing homes.

In 1974, Congress extended coverage of the National Labor Relations Act to "health care institutions" under the newly created Section 2(14) of the Act. Health care

institution is defined as including: “any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person.” The definition is broadly written and has been liberally construed in light of the legislative history which reveals that Congress intended the Board's jurisdiction be extended to the entire patient-oriented health care industry. *Beverly Farm Foundation, Inc.*, 218 NLRB 1275, 1276 (1975) (employer providing residential care and training to mentally retarded individuals is a health care institution); *Chicago School & Workshop for the Retarded*, 225 NLRB 1207 (1976) (employer engaged in the educational and vocational rehabilitation of retarded and/or developmentally disabled individuals is a health care institution).

Particularly instructive is the Board's decision in *Beverly Farm Foundation*. That case involved a nonprofit corporation which provided residential care and training exclusively for mentally retarded persons. Five percent of those individuals also had physical disabilities. 218 NLRB 1275. The employer provided classroom instruction, including vocational training in sewing, painting, etc. Additionally, the employer provided various recreational activities. The employer also operated “sheltered care facilities” which housed the residents. Under state statute, those sheltered care facilities were defined as providing “personal care and assistance, supervision oversight, and a suitable activities program.” *Id.* at 1277, fn.4. These facilities were for individuals who did not need nursing care, but did need personal care, assistance, supervision and/or oversight in meeting their daily personal needs. The employer employed cottage attendants who provided this regular care for the residents. The Board in *Beverly* held that it was clear from the legislative history that Congress

specifically intended the coverage of Section 2(14) to extend to facilities involved in providing care for the mentally retarded.

In a subsequent case, the Board held that a nonprofit corporation that provided educational, residential, and training services to the mentally retarded was a health care institution within the meaning of Section 2(14), and rejected the employer's argument that it was an adjunct to the public school system and therefore exempt from the Board's jurisdiction. *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, 239 NLRB 3, 6 (1978). While the dissent argued that the employer was educational in nature and therefore distinguishable from institutions providing services for the retarded over which the Board asserted jurisdiction as a health care institution, the majority disagreed and found that the employer's operations covered a broad range of service, including residential care, social skills, and behavior modification and found no significant distinction between those providing residential care and training to mentally retarded children. *Id.* at 10 fn. 11 (and cases cited therein). The Board therefore asserted jurisdiction and found the employer to be a health care institution.

The services provided by the Employer in the present case are similar to those in *Beverly* and *Resident Home*. In those cases, as here, the employers provided housing and residential care for their residents. Here, the evidence demonstrates that the Employer provides and bills for the same kind of services provided in both *Beverly* and *Resident Home*. However, unlike in *Beverly Farm Foundation* and *Resident Home*, the Employer's only focus in the instant case is the provision of housing and assistance to its residents in personal daily living activities. It provides no educational or rehabilitative

training. Therefore, in my view, the Employer's purpose is clearly "devoted to the care of infirm persons." See also, *Woods School*, 219 NLRB 242 (1975).

The fact that the Employer provides no educational or rehabilitative training is important to my decision in light of *Contemporary Guidance Services, Inc.*, 291 NLRB 50 (1988). In that case, the Board found that the employer, who was engaged in providing educational and vocational training services designed to prepare developmentally disabled clients for independent living, was not a health care institution. In so holding, the Board found that the services, which included training in various primary job skills including office skills, mailroom chores, retail merchandising and culinary training, were vocational rather than medical in nature. While the employer also had an urban residence program where its staff provided 24-hour services, these services were aimed at teaching independent living skills including cleaning, cooking and washing the laundry. In addition, the staff was responsible for evaluating the clients' needs, assessing skill attainment and disciplining clients when appropriate, planning recreational outings and transporting clients to the hospital for treatment. Thus, unlike the employer in *Contemporary Guidance*, the Employer in this matter is not involved in providing rehabilitative or vocational services, nor does the Employer in this matter have as part of its program preparing its clients for independent living.

In its brief, the Employer argues that what distinguishes it from the employers in *Beverly Farm Foundation* and *Resident Home for the Mentally Retarded of Hamilton County, Inc.* are the facts that both employed registered nurses and/or doctors who provided medical care, and in the case of *Beverly Farm Foundation*, that the facility was licensed as a health care provider. However, I do not find these distinguishing facts

sufficient to warrant a conclusion that the Employer is not a health care institution. My focus is on the nature of the services provided by the Employer – and clearly the sole function of the Employer’s personal care assistants is the care of disabled persons.

In conclusion, based on the evidence presented as well as the applicable case law, I conclude that the Employer is a health care institution within the meaning of Section 2(14) of the Act. As there is no dispute that this petition was filed outside the window period applicable to health care institutions, the petition is untimely and is therefore dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it is, dismissed.³

Signed at Minneapolis, Minnesota, this 20th day of May, 2005.

/s/ Robert W. Chester

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³ Under the provisions of Section 102.67 of the Board’s Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 –14th Street, N.W. Washington, D.C. 20570. This request must be received by the Board in Washington by **June 3, 2005**.

In the Regional Office’s initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office’s initial correspondence for guidance in doing so. The guidance can also be found under “E-Gov” on the National Labor Relations Board web site: www.nlrb.gov.